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ABSTRACT

This paper explores the use of "legalese" in non-policy debate resolutions. After defining legalese as legal jargon and terminology, the paper discusses how resolutional words and terms function within intercollegiate debate. It next deals with the purpose and practice of legal jargon within legal scholarship and practice, noting that there is increasing recognition within law schools and law offices that legalese has declining value. The paper then discusses the effect of legalese within Cross Examination Debate Association (CEDA) advocacy, maintaining that it provides much more confusion than clarity. The paper concludes that since legalese has little potential for a positive effect on students' advocacy or their future careers, and since it does not make the resolution more commonly understood, its use should be discouraged. Seventeen footnotes are included. (SR)

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THE USE OF LEGALESE IN NON-POLICY DEBATE RESOLUTIONS

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DISCLAIMER

As a lawyer who left the practice for coaching six years ago with no regrets, I had mixed feelings about my ability to be objective regarding the application of legalese to non-policy debate resolutions. I have done my best, but the reader is now on notice that my normal perspective presumes against things associated with legal practices.

INTRODUCTION

Even without a study to support it, I feel safe claiming that the most often voiced complaint in our sub-culture is not about debaters, critics, or the tab room ... it's about the resolution. That reaction is predictable and on target because nothing is more central to our activity!

This paper hopes to provide some useful thoughts about the selection of words and terms which make up the resolution. It will offer an explanation of how legalese functions in its original context and how its has operated within the last twelve C.E.D.A. resolutions we selected

to debate,[n.1] followed by suggestions for future applicability. The bottom line will be: Is it a positive or negative influence on the debate activity?

LEGALESE DEFINED

Only David Berube knows what he meant when he used the word "legalese" in my assignment. I define it for the purposes of this paper as legal jargon, terminology, and what the legal community commonly refers to as "terms of art." Most debate texts would put it into the category of field-specific or field-contextual language [n.2]. Its primary but not exclusive source is published judicial opinions [n.3]. Many of the words and phrases have been professionally sanctioned via inclusion in Black's Law Dictionary, legal encyclopedia, practice aids, horn books, text books, etc. As with any significant sub-groups inside sub-cultures, each jurisdiction arguably develops their own

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[1] I have only selected one out of the dozen as my first choice; and it wasn't the Fall '92 topic! Curiously no one ever remembers voting for the chosen resolution.
[2] E.g., See, Chapter 4, Freeley, Argumentation and Debate, Seventh Edition, 1990.
[3] A good example is the new standard announced in Webster which allows states to regulate abortions if they don't impose "an undue burden" on a woman's right to an abortion. This phrase was also the basis of Casey this past June. Stare decisis and the method of repeating key terminology in legal scholarship entrenches and almost codifies the meaning of the terms.

specialized meanings for jargon, but unless it becomes widely published (and is therefore included in the above category), the localized meanings lack influence to impact on those of us isolated in academe.

HOW RESOLUTIONAL WORDS AND TERMS FUNCTION WITHIN INTERCOLLEGIATE DEBATE[n.4]

Over the last three years, only half of my coaching career, I have listened to more than 300 rounds of debate. A conservative estimate (of 50%) would mean that 150 of those rounds have involved language disputes[n.5] about the meaning of the resolution. I'm generally bored with the mechanical, artificial, immovable stances all the advocates take about what the resolution means. A lot of it is not an attempt to determine what the meaning is or whether the argument is consistent with the meaning, but a dogmatic encouragement to punish the opponents for having a different interpretation.

My views on resolutional function are best left for another paper. It is sufficient for this effort to define resolutional function as the starting point for discourse

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[4] This section does not include all the nuances of how words function within resolutions. As I later note, that is the subject for another paper.

[5] I include Topicality, Justification, questions of resolutional sufficiency, and other arguments which center on resolutional language and establish interpretive standards, violations, etc.

in each round. That is true whether it functions merely to divide ground, or to establish the boundaries and level of significance to which the affirmative's plan/case must conform.

As the starting point of discussion, resolutional language choice is key to the proofs the affirmative will initiate[n.6] and thus what route the entire debate will take. For that reason alone, legalese within the topic likely puts debate issue selection into a pseudo-legal context. Likewise, a legally oriented topic such as the 1988 hand gun proposition will have a similar effect[n.7].

Both circumstances encourage debate of legal issues, via legal texts. Since many of our debaters intend to go to law school, laying a foundation for a legal vocabulary sounds eminently practical. Additionally, grounding the debate within legal parameters provides opportunities for what attorneys might call "bright line tests" which arguably discourage judge intervention by providing clear, objective decision criteria. But before awarding legalese a positive rating for use in CEDA debate, other elements need consideration.

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[6] It could effect negative approaches as well.
[7] Most arguments fell into two distinct classes: constitutionally based and those based on studies concerning gun misuse.

THE PURPOSE AND EFFECT OF LEGAL JARGON WITHIN SCHOLARSHIP AND PRACTICE

To justify debating legalese with the law school rationale, we must examine how it will serve our debaters as law students and practitioners[n.8]

Gerald B. Wetlaufer writes in the Virginia Law Review, "The public has less regard for our profession than we might like...Much of the work of the feminists, both inside and outside the legal academy can be understood as an effort to demonstrate that neutrality and objectivity are an illusion and to reconstruct discourse so that otherwise marginalized voices may be heard." Professor Wetlaufer is not just speaking of lawyers being heard, but of clients' voices being heard.

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[8] Although few lawyers will admit it, legalese is a tool of cultural domination and reinforcement. Lawyers are taught to communicate "professionally" to distinguish who is within their sphere of peers and who is not. In my opinion, most lawyers believe themselves to be at the top of an elite "superclass", and no one is superior to them unless it's another lawyer who hauled in a bigger fee! I am hopeful that some of our students will make significant changes in the civil and criminal justice systems, but past experience makes me cautious in my optimism. We need to increase understanding instead of litigation, but unfortunately everything in our culture (including debate) works against negotiation and towards conflict.

[9] Wetlaufer, Gerald, "Rhetoric and Its Denial In Legal Discourse," 76 Va. L. Rev. 1545, 1562, note 45.

There appears to be a small but growing trend in legal literature advocating a move to client narratives[n.10]. The argument in support recognizes the coldness, and "me versus them" effect interpretation into legalese has on clients and clients' problems. Some authors have characterized it as "interpretive violence."[n.11] In short, there is increasing recognition within the law schools and law offices of this country that legalese has declining value.

Professor Wetlaufer does not suggest a narrative approach, but advocates rhetorical communication strategies like those of Kenneth Burke, Stephen Toulmin, Chaim Perelman, Wayne Booth, and James Boyd White [n.12]. He believes a shift to these techniques will increase the attorneys' success in front of judges and juries. Why? Because "[t]hose lawyers who are particularly successful in persuading juries, in selling legal services, and in 'doing deals' seem sometimes to success precisely in the degree to which they do not (emphasis in original) think and speak like a lawyer."

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[10] See, Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich L. Rev. 2411 (1989); Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations", 22 Harv. C.R.-C.L. L. Rev. 323 (1987); Ross, "The Richmond Narratives", 68 Tex. L. Rev. 381 (1989).
[11] Alfieri, 16 NYU Rev. L. & Soc. Change 659 (1989).
[12] Ibid. at 1546.

An unfortunate truth about law school is that it has very little relationship to practicing law. Law school is rooted in traditions. How useful is legal terminology to playing the strategic game of "law school?" Influential educators are falling in line behind a more humanistic approach to legal pedagogy, and part of the shift in focus is a new communication style[n.13].

In the past, law school operated like a Topicality argument ... there is a predisposition that texts and terms have one true and universal meaning. While that may lend clarity, it suppresses lots of potential discovery[n.14].

The only remaining justification for legalese is the establishment of a "bright line" test for decision making. Unfortunately that is a rare accomplishment even in the legal community where everyone has at least a basic understanding of the legal vocabulary. Both elements are difficult: establishing the universal meaning, and getting concensus on how that meaning effects outcomes. A good example is obscenity case law. The Supreme Court has allegedly established clear standards of what speech/expression is unprotected because it is obscene. That claim is an illusion, at best. The members of the

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[13] See, e.g., Brest, "On My Teaching", 14 Stan. Law. 23 (1979); Halpern, "On the Politics and Pathology of Legal Education," 32 J. Legal Educ. 383 (1982); Kennedy, "Legal Education as Training for Hierarchy," Politics of Law 40; Feinman & Feldman, "Achieving Excellence: Mastery Learning in Legal Education", 35 J. Legal Educ. 528 (1985).
[14] Supra, note 9, at 1590.

Court can't even define "obscenity." The test is so vague, Justice Stewart said "I could never succeed in [defining it] intelligibly," but "I know it when I see it." [n.15].

THE EFFECT OF LEGALESE WITHIN THE SCHOLARSHIP AND PRACTICE OF CEDA ADVOCACY

Within the debate context, using legal jargon is even more problematic. Without training, the obfuscatory legalese in legal texts provides much more confusion than clarity. Second, just as we recognize "argument" has a different meaning in the communication arts context than in everyday conversation, legal constructs of common words have specialized meanings within the literature and language of law. Unless advocates understand the distinctions (many of hair splitting precision), using legalese has absolutely no value. I question the desirability of trying to educate our entire activity to this specialized terminology, especially in light of the pedagogical encouragement to move law more toward our discipline!

The only way to achieve the precision that is the benefit of any specialized, technical language comes from common understanding. Until we all go to law school before we debate and/or coach and/or judge rounds, there is no advantage.

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[15] Jacobellis v. Ohio, 378 U.S. 184, 197 (Stewart, J., concurring).

My own experience listening to rounds and coaching when legalese was involved has taught me that legal jargon has more influence on my role as a critic than I would like. I get annoyed and offended when debaters use terms incorrectly and with the significant amount of unintentional equivocation involved. I find it gets in the way of listening to the rest of the round. Another frequent problem is that only one team properly understands the contextual impact of the legal terms. On those occasions, the clash ratio is considerably diminished.

For non-lawyer coaches, the problems which might arise include a community-wide assumption that the legal context frames the debate and no available legal research resources[n.16]. Additionally, legalese in its current form frequently produces dry, technical distinctions which are difficult to make rhetorically appealing[n.17]. That makes it tough to coach and tough to listen to in rounds. The final round of Nationals on the gun control topic is a prime example.

The focus of the affirmative case was the level of scrutiny the Supreme Court should apply to laws regulating gun ownership. Gonzaga argued the Court had to apply a

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[16] The growing use of Lexis/Nexis and Westlaw solve that problem, but at a tremendous expense.
[17] Supra, at note 9. That is the justification for changing legal communication advanced by Professor Wetlaufer.

rational basis test and that the Affirmative's very limited new law "justified" the increased restriction of the possession of hand guns. By preempting a purely Constitutional rejection of their simple, non-intrusive proposed restriction, and by contextualizing the debate in a purely legal decision framework, the only Negative ground was to argue the restriction did not meet the rational basis test and/or the possession of hand guns deserved some higher level of protection (like strict scrutiny, which is only accorded to what the Court calls "fundamental right", ie. political speech is considered fundamental which is why the flag burning case was overturned).

My experience with legal scholarship concerning Constitutional issues leads me to believe issue resolution through the criterion of stare decisis, which was the essence of Gonzaga's case, makes for a very limited discussion. On the other hand, arguments to ignore stare decisis require many complex rationales. If there is any intention within the debate community to choose resolutions that are equitable to both sides, legalese should be avoided. Unless an issue has not reached the Supreme Court, there is so much presumption accorded existing case law a fair division of opportunity is difficult to guarantee. Both sides have ground, but the side supporting the status quo has a far easier job.

CONCLUSION

It seems clear to me that when the legal community is questioning the value of "talking like a lawyer", we should question it, too. If there was more potential for a positive effect on our student's advocacy or on their future careers; or if legal lingo made the resolution more commonly understood, I would encourage its use. However, that is not my assessment, and I must therefore respectfully dissent.